Supreme Court, U.S.
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No. 00-

In the Supreme Court of the United States

Samson Dubria,
Petitioner,
v.
G.A. Smith, Warden,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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ORDER ADOPTING MAGISTRATE JUDGE'S
REPORT AND RECOMMENDATION
DENYING PETITIONER'S 28 U.S.C. §2254
PETITION FOR WRIT OF HABEAS CORPUS
OF FEBRUARY 23, 1998 40

FILED
FEB. 13, 1997
CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY // DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAMSON DUBRIA, Petitioner, v. D.A. SMITH, Warden, California State Prison Corcoran, California, Respondent.	Civil No.96-657 BTM(AJB) Report and Recommendation

Petitioner, a state prisoner, proceeding by and through his counsel Charles M. Sevilla,. has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. Based upon all the papers filed in the case, and a review of the record, it is the recommendation of Magistrate Judge Battaglia that the petition be DENIED.

Procedural History

Petitioner was found guilty following a jury trial of murder together with a special circumstance of murder in the commission and attempted commission of rape. The jury found the murder to

be of the first degree. Petitioner was also found guilty by the jury of rape by use of drugs and of administering a drug in order to enable and assist himself to commit a felony. On April 16. 1993, Petitioner was sentenced to state prison for life without the possibility of parole for the special circumstance murder.

Petitioner filed an appeal with the California Court of Appeal, Fourth Appellate District, Division One, as well as a Petition for a Writ of Habeas Corpus. Both the appeal and the petition were denied by the Court of Appeal on July 18, 1995. Petitioner's petition for review with the California Supreme Court was also denied on October 19, 1995. Petitioner filed a Petition for Writ of Certiorari with the United States Supreme Court which petition was denied on February 20, 1996. Respondent does not dispute that Petitioner has exhausted his available state remedies.

Factual Background.[1]

Prosecution Case.

1. Death of Jennifer Klapper. At approximately 3:09 a.m. on August 16, 1991, the Carlsbad Police Department was dispatched Room 224 at the All-star Inn in Carlsbad, California. The officer responding was admitted to the room by Petitioner. Upon the officer's arrival, Jennifer Klapper was not breathing and had no pulse. Jennifer was lying on the bed closest to the door, and the other bed had not been slept in. The officer and Petitioner began two person cardiopulmonary resuscitation (CPR). The Carlsbad police officer noticed no chemical odor in the room, and

[1]This statement of facts is largely taken from the unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division One, dated July 18, 1995, and the facts are entitled to a presumption of correctness under former 28 U.S.C. § 2254(d).

paid no attention to Jennifer's face.

Firemen and paramedics arrived shortly thereafter. Jennifer was moved from the bed to the floor. CPR was continued and other life-saving and monitoring procedures were undertaken, including the placing of an oxygen mask over Jennifer's mouth and nose. None of these emergency personnel smelled a chemical odor in the room. Jennifer was transported by ambulance to Tri-City Hospital, where further attempts were made to resuscitate her. All resuscitation attempts were to no avail. The emergency room doctor found no cause for Jennifer's death.

2. *Relationship Between Petitioner and Ms. Klapper*

Jennifer Klapper, age 20, became friends with Petitioner, a 28 year old resident physician, at the Medical library at Good Samaritan Hospital in Cincinnati, Ohio. The relationship between Jennifer and the Petitioner was not a romantic one. Jennifer had stated that she did not find Petitioner romantically desirable, and at the time of her death, was romantically involved in another relationship. Jennifer and her boyfriend had talked of marriage. Several times after reaching California, Jennifer called her boyfriend, including one call only hours before her death. During the phone conversations, Jennifer told her boyfriend that she loved and missed him.

Petitioner had traveled to California to attend a class reunion, and asked Jennifer if she wanted to along. Jennifer discussed the trip with her boyfriend, explained her relationship with Petitioner was merely a friendship, and expressed reluctance to go on the trip because, among other reasons, she would be away from her boyfriend. Jennifer had expressed to another friend that she was uncomfortable about going to California with

Petitioner, since she did not know what he expected. Jennifer stated to that friend that she did not find Petitioner physically attractive and did not intend to have a physical relationship with him. Jennifer's sister also overheard a telephone conversation in which Jennifer told petitioner that they were just friends and if he expected to have a physical relationship while on the trip, she would have to cancel her plans to go.

3. Physical Findings and Cause of Death

The emergency room physician was unable to determine why Ms. Klapper had suddenly died. Several hours after her death, Ms. Klapper's body was examined by a coroner's investigator. The investigator noticed the lycra pants Ms. Klapper was wearing were on inside out. Jennifer was wearing jewelry, including an earring in her pierced right earlobe, but no earring in the pierced left earlobe. The investigator noticed scratches on Jennifer's face including a half moon scratch on her left cheek.

The coroner's investigator also examined Room 224 at the All-star Inn. The trash can in the room contained a beer can, a fuzzy navel club mixed drink carton, and a Styrofoam cup containing a yellowish liquid. None of the items had an odor except that of alcohol.

An autopsy was performed on Ms. Klapper's body by Forensic Pathologist, Dr. Leena Jariwala. The doctor found numerous abrasions and bruises on Jennifer's face, including pink or red abrasions on her upper and lower right eyelids, on her right chin, on her left cheek, and on the tip of her nose. The doctor concluded, because it appeared these injuries resulted in bleeding, they were inflicted before Ms. Klapper's heart stopped beating. It was the opinion of Dr. Jariwala and the emergency room physician who treated Ms. Klapper that these injuries were not

associated with the application of CPR. The firemen and paramedics who administered medical aid to Ms. Klapper did not believe any of the equipment used could cause the injuries to her face, nor had they seen such injuries caused by CPR.

The autopsy also revealed a hemorrhage in Ms. Klapper's right temporal bone, which injury was not life threatening. An examination of swabs taken from Ms. Klapper's vagina indicated she had sexual intercourse relatively close to the time of her death. No vaginal injuries were detected.

After completing the autopsy, Dr. Jariwala could find no cause of death. Dr. Jariwala had Jennifer's brain examined by a team of nueropathalogists, who found no abnormalities. Toxicological tests were performed on body fluid samples taken from Jennifer. Drug testing produced only one anomalous result. The tests indicated 24 micrograms of chloroform in Jennifer's blood, 7 micrograms of chloroform per gram of her liver tissue and 17 micrograms of chloroform per milliliter of her gastric contents. No chloroform was found in the urine sample. Based on the toxicological findings, Dr. Jariwala concluded the cause of death was chloroform intoxication.

4. *Chloroform Poisoning*

Dr. Lucien Morris. an eminent anesthesiologist with extensive practical and experimental knowledge of chloroform, explained the history and nature of chloroform. Death can occur from the inhalation of chloroform in several ways. One is a "relative overdose". A lethal relative overdose occurs when a relatively small amount of chloroform is suddenly inhaled. The concentration of chloroform rises quickly, causing disruption of electrical activity in the heart. The amount of chloroform required to cause a relative overdose is very small.

Death may also result from a "frank overdose" of inhaled chloroform.. A frank overdose occurs when a large amount of chloroform is inhaled. Such inhalation causes a depression of several body systems, including the circulatory and respiratory systems to the extent that death can result.

Dr. Morris reviewed the medical, toxicological, and police reports in this case. He concluded that assuming chloroform was administered to Jennifer in the motel room, it was possible its smell dissipated before the arrival of the police. Dr. Morris concluded Jennifer's death resulted from a relative overdose of inhaled chloroform.

5. *Petitioner's Statements.*

Petitioner's statement to the paramedics at the All-star Inn, was that he had gone to the bathroom, and while in the bathroom he heard a cry or moan and then a 'thud" as if someone had fallen. Petitioner returned to the room and found Jennifer on the floor. At that time, Petitioner did not tell the paramedics or police that the two had sexual intercourse that night.

Later that morning at the hospital, Petitioner talked with other officers, and repeated his rendition of the facts involving finding Jennifer on the floor of the motel room. Petitioner told the officers that he had examined Jennifer, found no pulse, and started CPR. He then left the room, went to the motel office, and asked the clerk to call 911. Petitioner told the officers he ran back to the room, discovered he had locked himself out, returned to the office to get another key, and return to the room. Petitioner stated he did not know why he did not use the telephone in the motel room to call 911. Petitioner did tell these officers that be and Jennifer had sexual intercourse that evening, and that they were just friends. Later that morning, back at the All-star Inn,

Petitioner spoke with other officers. Petitioner told these officers that be and Jennifer had been to a taping of the Johnny Carson Show, they had a pizza, bought some alcoholic beverages in Burbank, California and then drove to Carlsbad. Petitioner and Jennifer were going to stay at a campsite at San Elijo State Beach, but arrived instead at the All-star Inn at about 11:30 p.m. There, they watched the show they had seen taped earlier in the day. Jennifer complained of dizziness and headaches, and Petitioner told the officers Jennifer had a history of headaches. Petitioner then again restated his version of events regarding finding Jennifer on the floor, administering CPR, leaving the room, and locking himself out.

Petitioner also told the officers that the paramedics arrived between 5 and 15 minutes after he left the room. Petitioner stated he told paramedics he would follow them to the hospital, but stated he returned to the room to get information about reaching Jennifer's family and about 5 minutes later departed. Petitioner stated this was only an estimate of time, that he was in a frenzy and stayed at the motel for a few minutes to catch his breath. Petitioner stated be told the paramedics he would follow them to the hospital, but meant he would follow later and not immediately. Petitioner told the officers that he and Jennifer had intercourse that night, that he had a beer and mixed drink that night, and that Jennifer had several sips of the drink. Petitioner told the officers that he did not know what had killed Jennifer, and that they had been together all day and all evening except for short times when she used the telephone.

By October, 1991, coroner's investigators had determined Jennifer's death was the result of chloroform intoxication. Petitioner was interviewed in New Jersey by Carlsbad police detectives on October 23, 1991. The officers sketched a theory for Petitioner that Petitioner had wanted to have sex with

Jennifer, used a little too much chloroform, resulting in her death. Petitioner denied having any knowledge of chloroform, having ever used chloroform, and killing Jennifer. Petitioner stated that the act of intercourse that evening was consensual. Petitioner explained to the officers that he and Jennifer had a reservation at a camp ground, but were scheduled to arrive at 7 or 8:00 p.m. Petitioner had told Jennifer that they were not going to make it to the campsite in time, so Petitioner found a motel with a low rate since the two were trying to save money, where Petitioner registered as a single and obtained a single room with two beds. Petitioner stated that Jennifer agreed with this arrangement.

6. *Check-In Procedures at San Elijo State Beach*

Petitioner had a reservation for a camp site at the San Elijo State Beach for August 15-17, but records indicated he did not appear to claim the camp site. The entrance booth at the park closes between 10:30 and 11:00 p.m., but the park remains open. A note is placed in the window of the booth telling late comers which campsite has been assigned to them. Nothing on the park's recorded telephone message stated the reservations of late arriving campers would not be honored.

B. ***Defense Case***

1. *Rapist Profile and Character Evidence*

Dr. Cynthia Stout, a marriage, family and child counselor, and Dr. Edward Conolley, a clinical psychologist, tested and took a history of Petitioner. Both testified that a profile existed for the majority of rapists and they found Petitioner did not fit that profile. Petitioner also offered a series of witnesses who testified to his compassion. empathy, trustworthiness, and other traits of good character.

2. *Medical Testimony*

Dr. George Schwartz, a Board certified emergency room physician, reviewed the medical and police reports as well as the testimony in the case and researched the literature concerning chloroform. Dr. Schwartz agreed with most of the conclusions reached by the prosecution experts concerning chloroform, including that Jennifer died from an adverse reaction to the presence of chloroform in her body. Dr. Schwartz, however, believed Jennifer had ingested rather than inhaled the chloroform as had been concluded by the prosecution's expert. Dr. Schwartz's calculations, based on the autopsy report, led him to believe that there was more than half a teaspoon of chloroform in Jennifer's stomach contents at the time of her death. This amount was consistent with ingestion of the substance but not inhalation. Dr. Schwartz indicated that, while still unusual, chloroform's use to produce giddiness for recreational purposes was on the rise. Chloroform was both ingested and inhaled for such purpose.

Dr. Schwartz also believed that the injuries to Jennifer's face were consistent with those which occurred during attempts at resuscitation. The doctor disagreed with the prosecution's expert testimony that since the injuries had bled they necessarily occurred before death. Dr. Schwartz believed CPR could have created enough circulation to cause blood seepage into post mortem facial injuries.

Dr. Schwartz concluded, given the electrical activity noted by the paramedics in Jennifer's heart, death must have occurred from 5 to 30 minutes before the paramedics arrived. Dr. Schwartz believed the smell of chloroform would persist in a closed room for 8 to 12 hours and would have been smelled by emergency personnel when they arrived. Oral ingestion would not have caused a great deal of vaporization, and the doctor believed that

attempts at getting rid of the smell could be successful in a relatively short period of time.

4. Petitioner's Testimony

Petitioner testified in his own defense, stating he met Jennifer at the library at Good Samaritan Hospital in Cincinnati, Ohio. Eventually Jennifer was laid off from the library. However the two maintained a relationship. Petitioner and Jennifer went out on seven "formal dates", including going out for dinner, playing tennis, and simply going for walks. Petitioner had kissed her for the first time in April, 1991, and in May, 1991, after bowling the two kissed and "cuddled" in the back seat of Petitioner's car.

In March, 1991, the two began discussing a trip to California. Petitioner told Jennifer he was able to purchase a round trip ticket to Los Angeles that would allow two persons to fly for $189. In June, 1991, Petitioner left Ohio and moved to New Jersey. The two communicated by telephone and continued discussing the California trip. Eventually, the two agreed to come to California and Petitioner arrived before Jennifer and picked her up on August 11, 1991 at the airport.

Petitioner and Jennifer went to Petitioner's parents' house, where Petitioner slept on the living room couch and Jennifer slept in one of the bedrooms. The two spent several days seeing the sites. On August 15 at 4:00 p.m.. Petitioner and Jennifer watched the taping of the Johnny Carson show. The taping lasted about 2½ hours. When it was over, the two departed with camping gear for the San Elijo State Beach campground. On the way, they stopped for dinner and picked up a beer and a fuzzy navel mixed drink. It was 9:30 p.m. before the two left for the campground.

Petitioner and Jennifer stopped for gas, and Petitioner called the campground. He was told visitors were not accepted after 10:30 p.m.. Since it was already after 10:30 p.m. and they did not know how to get to the campsite, they decided to seek other accommodations for the night. Petitioner registered at the All-star Inn. The pair settled into the room at about 11:30 p.m., and Jennifer turned on the television to watch the Johnny Carson Show they had seen taped earlier in the day. Jennifer lay on one of the two beds, and Petitioner walked between the beds, handed her the fuzzy navel drink and turned off the light on the nightstand. Jennifer moved over on the bed, indicating Petitioner should lie down next to her. Petitioner put his arm around Jennifer and the two began to "cuddle". The two talked, kissed, and eventually had intercourse. Before having sexual relations Petitioner asked Jennifer if she was using any type of birth control method. Jennifer stated she was on the pill.

Petitioner again testified regarding the sequence of events leading up to Jennifer's death, consistent with his earlier statements to police. Petitioner stated that he was told by the fire captain they would be taking Jennifer to Scripps Hospital in Encinitas, and drove there. Upon arriving, Petitioner was told that Jennifer had not been brought there, was told she might have been taken to Tri-City Hospital, and was given directions to that location. Petitioner went to Tri-City Hospital and found Jennifer was there and had been pronounced dead.

C. *Prosecution Rebuttal*

1. *Character Evidence*

The prosecution offered the testimony of three doctors who had worked with Petitioner. The doctors did not believe Petitioner was trustworthy and did not believe Petitioner had a

good reputation for trustworthiness.

2. *Evidence Concerning Birth Control Pills*

Jennifer's gynecologist testified that in August 1991 Jennifer complained of menstrual spotting between her periods. On August 2, 1991, the doctor, without Jennifer's request that he do so, prescribed a cycle of birth control pills to treat the problem. The doctor had never before prescribed birth control pills for Jennifer. Jennifer was given two packages of pills, and she was to begin taking the pills on August 18, 1991, two days after her death. In Jennifer's belongings turned over to her father after her death was a single packet of birth control pills with none of the pills missing.

3. *Rapist Profile*

Forensic psychiatrist Dr. Melvin Goldzband testified there was no such thing as a rapist profile which can predict whether a person will commit rape.

4. *Recreational Use of Chloroform*

Dr. Bushong, the emergency room doctor who treated Jennifer, stated that he had never heard of the use of chloroform for recreational purposes, and had never heard of any patient at his hospital, other than Jennifer, who had died from an overdose of chloroform.

5. *Chloroform Intoxication*

Dr. Graham Jones, a pharmacologist and toxicologist familiar with chloroform, concluded Dr. Schwartz was mistaken when he concluded Jennifer had ingested rather than inhaled the

chloroform found in her system. Dr. Jones demonstrated mathematically that Dr. Schwartz was mistaken when he concluded there was from a half to one teaspoon of chloroform in Jennifer's gastric contents at the time of her death, noting the actual amount of chloroform present was about one thousand part of one teaspoon. Dr. Jones concluded that Jennifer did not ingest chloroform, and that the amount of chloroform found in Jennifer's body fluids was consistent with those of a person who died from a fairly quick inhalation of a fairly high concentration of chloroform. Dr. Jones testified it was certainty possible for the odor of chloroform to dissipate in half hour to an hour.

D. Defense Surrebuttal

Dr. Schwartz agreed he had made an error concerning the amount of chloroform in Jennifer's gastric contents. Dr. Schwartz still believed it was possible Jennifer had ingested rather than inhaled chloroform. Dr. Schwartz believed other causes of death were possible, including aspiration, noting aspirated material was found in Jennifer's lungs.

The defense also recalled one of its psychological experts who stated the individual who would commit the crimes in this case would have signs of mental disturbance that would have been detected in testing, and that Petitioner did not fit the psychological profile of a rapist.

E. Prosecution Surrebuttal

Dr. Jariwala testified that Jennifer did not die from aspiration, and again discounted all possible causes of death except chloroform intoxication.

The second packet of birth control pills given to Jennifer

by her gynecologist was found in a cabinet in the bathroom used by Jennifer at her home.

Discussion

The Petition raises six claims for relief: (1) insufficiency of the evidence; (2) violation of the Fifth Amendment; (3) violation of due process by instructional error; (4) violation of due process in evidentiary errors; (5) ineffective assistance of counsel; and (6) unconstitutionality of sentence. Before addressing the substance of Petitioner's claims, however, the Court will address Respondent's claims that the Petition should be dismissed because it is not signed under penalty of perjury by Petitioner, and that the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), signed into law on April 24, 1996, applies to this case.

A. Respondent's Claims Regarding Signature of the Petition and Applicability of AEDPA

1. *The Petition Should Not Be Dismissed Based Upon Lack of Petitioner's Verification.*

The Petition in this case included a verification, signed by Petitioner's counsel Charles M. Sevilla under penalty of perjury, that Mr. Sevilla is authorized to file the Petition on Petitioner's behalf, and that Mr. Sevilla believes and alleges that the contents of the Petition are true.

Pursuant to 28 U.S.C. Section 2242, an "Ia]pplication for a writ of habeas corpus shall be in writing signed and verified by the person for whose relief it is intended *or by someone acting in his behalf."* (Emphasis added); *see also* Rule 2(c) of the Rules Governing § 2254 Cases, Advisory Committee Notes ("the

petition must be signed and sworn to by the petitioner (or someone acting in his behalf)."). The verification provided by Petitioner's counsel in this case is sufficient to allow the Petitioner to proceed.

2. *Applicability of AEDPA.*

Respondent argues that the AEDPA applies to this case, and limits the Court's ability to grant any habeas relief based upon the Petition. Under Section 104 of the AEDPA.

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Respondent argues that this new standard for habeas corpus relief is to be applied retroactively to all pending eases, including the current Petition.

In Jeffries v. Wood, 1996 WL 730493 (9th Cir. 1996), the Ninth Circuit held that amendments to Chapter 153 of Title 28 of the United States Code contained in Title I of the Act do

not apply to cases filed in the federal courts of this Circuit prior to the Act's effective date of April 24, 1996." Because the standard set forth above is an amendment to Chapter 153, and is contained in Title I of the Act, it does not apply retroactively to this case which was filed on April 12, 1996, twelve days prior to the effective date of the Act.

The Court notes, however, that the AEDPA significantly curtails the scope of federal habeas corpus review. If Petitioner is not entitled to relief under the more lenient standards of the pre-1996 case law, the Petition would similarly be denied under the new standards.

B. Petitioner's Claims for Relief

1. *Insufficiency of the Evidence*

Petitioner's claim of insufficiency of the evidence contains two elements. First, Petitioner claims that there was no factual basis upon which a reasonable jury could have found him guilty beyond a reasonable doubt of the murder, rape, and rape special circumstance. Second, Petitioner claims that his rights to due process were violated by the presentation by the prosecution of false, contaminated toxicological evidence. Each of these claims are reviewed individually below.

(a) General Claim of Insufficiency of the Evidence.

A state prisoner who alleges that the evidence presented at trial was insufficient to lead a rational trier of fact to find guilt beyond a reasonable doubt has stated a federal constitutional claim. Jackson v. Virginia, 443 U.S. 307, 321 (1979). Where a state prisoner claims, under 28 U.S.C. Section 2254, that he is entitled to relief due to the insufficiency of the evidence, the

relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Riggins 40 F.3d 1055, 1057 (9th Cir. 1994), quoting Jackson, 443 U.S. at 319).

Upon examining Petitioner's claim of insufficiency of the evidence, the California Court of Appeal applied the correct legal standard. It found that the evidence amply supported the conclusion that Jennifer died of chloroform inhalation. It further found, after rejecting the possibility of post-mortem contamination of the body fluid samples, that the presence of chloroform by any method other than its administration by Petitioner "becomes difficult to accept." Finally, the Court determined the evidence was sufficient to find appellant applied the chloroform for the purposes of raping Jennifer, and therefore that he killed her in the commission of a rape.

Assuming for the sake of argument that Jennifer died of chloroform inhalation,[2] Petitioner argues that the evidence is in no way sufficient to support a finding that the chloroform was administered by Petitioner in an effort to rape Jennifer. However, viewing the evidence in the light most favorable to the State, the evidence was sufficient to allow a rational trier of fact to find Petitioner guilty beyond a reasonable doubt of murder in

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[2] In part B.1 .b below, Petitioner's argument regarding the presentation of "false, contaminated toxicological evidence" sets forth a theory that the chloroform found in Jennifer's body fluids was the result of laboratory contamination, therefore disputing the finding that Jennifer died from chloroform intoxication. However, for purposes of the general argument regarding insufficiency of the evidence only, Petitioner accepts the finding that Jennifer died of chloroform intoxication.

the commission of a rape.

The only explanation for the presence of chloroform in Jennifer's body offered by the defense at trial, ether than possible post-mortem contamination of the body fluid samples, was that Jennifer self-administered the chloroform. However, there was no evidence presented at trial that Jennifer had voluntarily or intentionally inhaled chloroform. Given the testimony of Dr. Bushong that none of the emergency room literature mentioned chloroform as a recreational substance, and that he had never seen a case of chloroform intoxication, the jury could reasonably have concluded that Jennifer did not inhale the chloroform for a recreational purpose. Additionally, evidence was presented at trial regarding the presence of scratches and abrasions on Jennifer1s face, which were not caused by the administration of CPR or other lifesaving methods by emergency personnel. It was also shown that Jennifer had sexual intercourse at some point near the time of her death, despite evidence that she did not have a physical relationship with Petitioner and was not physically attracted to Petitioner. Finally, the pants Jennifer was wearing when police arrived were inside out. All of these facts are sufficient to support a finding that Petitioner killed Jennifer during the commission of a rape.

Petitioner in his traverse makes several arguments regarding the proper inferences to be drawn from the evidence presented in this case. However, these arguments regarding the voluntary use of chloroform by Jennifer, the consensual nature of sexual contact between Petitioner and Jennifer, the inability of Petitioner to accomplish both the chloroform poisoning and rape given the estimate timing of Jennifer's death, and the source of scratches on Jennifer's face were all made at trial and rejected by the trier of fact. Upon review of the record, the evidence was sufficient to support the finding that Petitioner

killed Jennifer in the commission of a rape under the standard set forth in Jackson v. Virginia. Therefore. Petitioner's claim of insufficiency of the evidence does not justify relief on his Petition.

b. Claim of Presentation of False, Contaminated Toxicological Evidence.

Petitioner argues that he was denied due process of law by the presentation of false, contaminated toxicological evidence by the prosecution at trial. In support of his proposition that such claim supports habeas relief, Petitioner cites to United States v. Young. 17 F.3d 1201, 1203-04 (9th Cir. 1994). In Young, the Ninth Circuit heard an appeal by the appellant of his federal conviction and sentence for drug trafficking. Appellant claimed that his conviction was obtained by the "knowing use of perjured testimony." Specifically, the prosecutor presented testimony from a witness that certain notebooks and "Chem Lab" business cards were found taped under the dashboard of appellant's truck. The witness testified that although he did not personally search appellant's truck, he was there when the other officer searched the truck, and the other officer told him that the notebooks were taped under the dashboard. The notebooks contained writings which were interpreted by another government witness as relating to methamphetamine manufacture. After the trial, appellant's lawyer found out that the officer who found the notebooks *had not* found the notebooks and "Chem Lab" cards taped under the dashboard of appellant's truck, but rather she found them in a paper hag in the cab of the truck. At the hearing on appellant's motion for new trial, this officer testified she had told the prosecutor where she found the notebooks during the trial, before the other witness testified.

Based upon this evidence, the Ninth Circuit found that appellant's conviction was based in part on false evidence. The

Court therefore reversed the trial court, and found the petitioner was entitled to a new trial. "A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness. Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial 'if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different.'" Young, 17 F.3d at 1203-04 (quoting United States v. Endicott, 869 F.2d 452,455 (9th Cir. 1989)).

Young, however, is not authority for the granting of habeas relief based upon the present Petition. First, Young is a direct appeal of a denial of a motion for new trial based upon a federal conviction. As such, it does not address the constitutional basis of a claim that the presentation of false evidence was a violation of due process, and does not hold that the presentation of false evidence violates due process. Second, Petitioner has made no showing that the toxicological evidence in this case was "false." Petitioner's arguments merely continue his attempt to disprove the prosecution's theory of the case. However, "federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution-- not to correct errors of fact." Herrera v. Collins, 506 U.S. 390, 400 (1993). Therefore. Petitioner's argument that false evidence was presented at trial does not justify habeas relief.

2. *Petitioner's Miranda Claims*

Petitioner raises two claims with regard to alleged violations of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). First, Petitioner claims that when he was questioned by officers in New Jersey on October23, 1991, he was "in custody" for purposes of Miranda and should have been advised of his rights thereunder, such that any statements taken from him should have

been excluded at trial. Second, Petitioner claims that his due process rights were violated when a tape recording of the interview was played for the jury, a transcript of the interview was given to the jury, and the prosecution exploited inconsistencies in statements made during the interview.

(a) Claim of Miranda Violation

The following facts are relevant to the "in custody" inquiry regarding the alleged Miranda violation.[3] After his initial interview with the Carlsbad Police Department on August 16, 1991. Petitioner returned to his home in New Jersey. On the morning of October 23, 1991, two officers from the Carlsbad Police Department arrived at the New Jersey complex where Petitioner lived, along with Sergeant Gannon of the Morris County New Jersey prosecutor's office. All of the officers were in plain clothes, and their car was unmarked. The officers believed Petitioner was a prime suspect in Jennifer's murder.

As the officers drove up to the complex, they saw Petitioner walking toward a parking lot. One of the Carlsbad officers got out of the car and asked Petitioner if he would go with the officers to an office in town to talk. Petitioner agreed to go, but wanted to call the hospital, whereupon the officer suggested Petitioner call from the office. Petitioner was told he would be brought back after the interview. On the ride to the office, Petitioner and the officers discussed the weather, the area in which Petitioner lived, the officers' flight from California, and other topics not related to the

[3] These facts are taken from the July 18, 1995 unpublished decision of the California Court of Appeal, and are entitled to a presumption of correctness under former 28 U.S.C. § 2254(d).

homicide. Petitioner asked how long the interview would take, and was told it would take between one and two hours. No force or suggestion of force was used in contacting Petitioner, and no restraints were employed by the officers in transporting Petitioner.

Petitioner was taken to the prosecutor's office, which was in an office building. He was not taken to a police station. Petitioner asked and was allowed to make several telephone calls privately from a lieutenant's office. Petitioner was offered food and use of the facilities, and then was interrogated by the Carlsbad Police officers in an interview room. The officers told Petitioner the door to the room was unlocked and that he could leave at any time. Petitioner was also told he would be given a ride home.

The officers obtained some background information from Petitioner, and then told him if he had anything to do with Jennifer's death he should tell them about it. The clear tone of the officers' questions and comments was that the officers believed Petitioner was involved in causing Jennifer's death. Petitioner told the officers he hail nothing to do with Jennifer's death.

The officers went on to tell Petitioner they believed he was responsible for Jennifer's death, but that her death was probably an accident. Petitioner asked the officers what evidence they bad, where upon the officers said they knew what happened and it was time Petitioner told the truth. The officers told Petitioner Jennifer died of chloroform intoxication.

The interview thereafter became a sparing session, with the officers explaining how they believed Petitioner caused Jennifer's death, and with Petitioner denying he caused Jennifer's death. Petitioner recounted for the officers his version of what

happened on the trip and the night Jennifer died.

At one point Petitioner requested that the interview stop so he could call his family. Petitioner was allowed to make this telephone call, and thereafter Petitioner stated he wished to make no further statements. The officers told Petitioner they would take him home and would continue working on the case. The interview then ended, and Petitioner was driven home by one of the Carlsbad officers.

At no time was Petitioner told he was under arrest. Petitioner was told on several occasions he was not under arrest, that he was free to go at any time, and that he would be given a ride either home or to work.

Warnings under Miranda v. Arizona are required to be given prior to "custodial interrogation." Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. In a noncustodial setting, where the person being questioned has not been formally arrested or otherwise formally detained, "Miranda warnings are require4 only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495 (1977). The Court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest'." Stansbury v. California, 114 S. Ct. 1526, 1529(1994) (quoting California v. Beheler. 463 U.S. 1121, 1125 (1983). An officer's knowledge or belief regarding the guilt of the person being interviewed are relevant only insofar as they are conveyed by word or deed to the person being interviewed, and to the extent those beliefs "would affect

how a person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action'." Stansbury, 114 S. Ct. at 1530.

The factual determinations of the state court regarding the circumstances surrounding the interrogation are entitled to a presumption of correctness under former Section 2254(d). However, the ultimate determination of whether a person is "in custody" for purposes of requiring Miranda warnings is a mixed question of fact and law which must be reviewed by the federal court independently, based upon the facts. Thompson v Keohane, 116 S. Ct. 457, 465 (1995).

It cannot be said that Petitioner's interview in this case took place under circumstances as to lead a reasonable person to believe that he was no longer free to leave. Petitioner stresses that he told he was free to go prior to the point in time the accusatory interrogation began, and that once the pointed interrogation began, a reasonable person would not have believed he was still free to go. However, it is clear that when Petitioner expressed a desire to take a break from the questioning to call his family, he was permitted to make the telephone call. Thereafter, the questioning ended upon Petitioner's request, and he was given a ride back home. Under all of the circumstances, it cannot be said that the circumstances surrounding the interview were so coercive as to render the Petitioner "in custody"' and require the giving of Miranda warnings.

Therefore, Petitioner's argument that his Miranda rights were violated by the October 23, 1991 interview does not justify relief upon the Petition.

(b) Introduction of Tape Statements by Petitioner

Petitioner argues his right to due process was violated by the introduction into evidence of his statements taken during the interview on October 23, 1991. During the testimony of the interrogating officers, the unedited tape of the October 23, 1991, interview was played and the jurors were provided transcripts of the recording. The interview on October 23. 1991 was essentially a sparring session, with the officers expressing that belief in Petitioner's guilt, and his involvement in Jennifer's death. Petitioner argues that the playing of the tape recording, and the provision of the transcript of the interview to the jury was a highly prejudicial and inflammatory means of putting before the jury otherwise inadmissible opinions and statements of the chief investigating officer regarding petitioner's guilt. Petitioner argues that the introduction of the tape recorded interview, both individually and when combined with the alleged Miranda violation, violated Petitioner's right to due process.

Errors regarding state court evidentiary rulings ordinarily do not rise to the level of constitutional violations. Estelle v. McGuire, 502 U.S. 62 (1991). The category of errors which violate "fundamental fairness" so as to amount to a violation of due process is narrow. Id. at 72. The inquiry is whether the alleged error "so infused the trial with unfairness as to deny due process of law." Id. at 75 (quoting Lisenba v. California, 314 U.S. 219, 228 (1941). In this case, the jury was instructed and admonished that the officer's statements were not admitted for their truth, but only to be considered as giving meaning and context to the Petitioner's statements. Therefore, it is not at all clear that the introduction of the statements was erroneous. Even if the introduction of the statements was erroneous, it cannot be said that the introduction of the tape recorded interview or the transcript rises to the level of violating fundamental fairness. Therefore, Petitioner's argument that he was denied due process is not a sufficient basis for the granting of habeas relief on his

Petition.

3. Violation of Due Process by Instructional Error

Petitioner argues that his rights to due process were violated by the trial court's (a) failure to give lesser included offense instructions regarding rape; (b) the trial court's failure to give a proper reasonable doubt instruction.

(a) Failure to Give Lesser Included Offense Instruction Regarding Rape

Petitioner's jury was charged with instructions on rape. Petitioner also requested that the jury be given lesser included instructions regarding rape, which could have effected the special circumstance finding and liability for murder.

The Supreme Court has held that the failure to give a lesser included offense instruction in a capital case is constitutional error. Beck v. Alabama, 447 U.S. 625 (1980). With regard to non-capital cases, however, the Supreme Court has never held that the giving of a lesser included offense instruction is required under the Eighth Amendment. In Turner v. Marshall, 63 F.3d 807 (9th Cir. 1995), the court acknowledged that it is not settled whether Beck applies to non-capital cases. The Ninth Circuit has previously declined to find any constitutional error arising from the failure to instruct on a lesser included offense in a non-capital case. Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984). The court in Turner did not specifically hold that the failure to give a lesser included offense instruction would not amount to a constitutional error. However, the court stated that "any finding of constitutional error would create a new rule, inapplicable to the present case under

Teague ."[4] Turner, 63 F.3d 819.

Petitioner argues that requiring a trial court to give a requested lesser included offense instruction is not a new rule of due process law, such that Teague is not applicable. In addition, Petitioner argues that the giving of a lesser included offense instructions would be a "water shed rule of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding" so as to fall under the exception in Teague. Asaffle v. Parks, 494 U.S. 484 (1990). These arguments, however, cannot be accepted given the Ninth Circuit finding to the contrary in Turner. Because the error asserted by Petitioner is not one of constitutional magnitude, the Petition cannot be granted based upon the trial court's falure to give lesser included offense instructions regarding rape.

(b) Reasonable Doubt Instruction.

Petitioner argues that his right to due process was violated by the trial court's instruction regarding reasonable doubt. The jury was instructed as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving him guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to

[4] Teague v. Lane, 489 U.S. 288 (1989).

> human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction to a moral certainty of the truth of the charge.

Petitioner objects to the use by the trial court of the term "moral certainty" in relation to the definition of reasonable doubt, and argues that the use of the instruction above unconstitutionally diluted the reasonable doubt standard.

In Victor v. Nebraska, 114 S. Ct. 1239 (1994) the petitioner challenged the exact same jury instruction which was given in this case. Upon examination of the instruction, the Court found no constitutional error resulting from the use of the term "moral certainty." The Court stressed that the remainder of the instruction provided context to the "moral certainty" language, such that it was unlikely that the jury applied the reasonable doubt instruction to require proof of any anything less than due process requires. Id. at 1248.

The instruction given by the trial court in this case did not violate Petitioner's right to due process. Therefore, Petitioner's claim in this regard is not a proper basis for habeas relief.

(4) Violation of Due Process As a Result of Evidentiary Errors

Petitioner claims his right to due process was violated as a result of evidentiary errors by the trial court. First, Petitioner argues the trial court erred in admitting rebuttal evidence by the prosecution relating to his alleged lack of trustworthiness.

Petitioner asserts this error was exacerbated by limitations placed upon defense counsel in cross-examination of the rebuttal witnesses. Second, Petitioner argues the trial court erred in excluding inquiry regarding Jennifer's previous use of birth control methods.

(a) Rebuttal Evidence of Trustworthiness

The defense presented testimony of two psychological experts, who opined that there existed a rapist profile and that Petitioner did not fit that profile. To support this argument, Petitioner presented testimony by ten character witnesses regarding his character traits. Defense counsel elicited testimony regarding Petitioner's character traits, including that he was empathetic, unselfish, went out of his way to help others, was committed to medicine, was a good and caring doctor, was never unkind, never said a bad word about anyone, was never chauvinistic, never treated women as sex objects, was always respectful to women, had excellence of character, was a gentleman, courteous, sympathetic, and a good friend. One of the character witnesses was a doctor who gained his opinion of Petitioner while supervising him in a hospital setting.

The tenth character witness was asked by defense counsel if she found appellant loving and compassionate. In response the witness testified "He is a loving, compassionate person, very caring, sensitive, trustworthy. Very respectful person, very polite. Very gracious and very helpful." Neither counsel asked that any portion of the answer be stricken as nonresponsive.

The prosecution thereafter indicated an intent to present rebuttal evidence regarding Petitioner's lack of trustworthiness. Defense counsel argued he had never raised the issue of trustworthiness in his questioning, and that the witness who

stated Petitioner was trustworthy simply "blurted" out the word. Defense counsel argued that the witness's testimony that Petitioner was trustworthy was nonresponsive, and suggested that it be stricken. The trial court found the defense had elicited testimony regarding trustworthiness, entitling the prosecution to rebut such evidence.

The prosecution presented testimony by Dr. Dumbauld and Dr. Epperly, both of whom supervised Petitioner in a residency program. Dr. Dumbauld testified "I had a difficult time trusting [petitioner] from a physician's standpoint," and testified that Petitioner did not have a good reputation for trustworthiness. Dr. Epperly testified "The reputation was that if he told you about something, you should check and make sure it was the way that he presented it to you." Petitioner responded to this rebuttal evidence through the testimony of several more character witnesses, including doctors with whom Petitioner had worked. These doctors indicated in the strongest terms that appellant was trustworthy. The prosecution offered additional rebuttal evidence thereafter from a third physician, Dr. Pilger, who had supervised Petitioner in a resident program, who opined that Petitioner was not trustworthy.

During the defense cross-examination of Dr. Dunibauld, who testified for the prosecution regarding Petitioner's alleged lack of trustworthiness, defense counsel offered an evaluation of Petitioner written by Dr. Pilger. Defense counsel's purpose in offering this evaluation was to try to show that Dr. Dumbauld's opinion of Petitioner was largely based upon Dr. Pilger's one bad evaluation. The trial court allowed defense counsel to question Dr. Dumbauld generally on cross-examination about the report but excluded efforts by the defense to inquire regarding specifics of the report. Dr. Dumbauld testified that the reports did not play any significant part in his evaluation of Petitioner's

trustworthiness. Petitioner argues he was not permitted to show bias during the cross-examination, in violation of his right to due process and in violation of the Confrontation Clause.

As discussed above in section B.2.b, in order to show a violation of due process, Petitioner must show some error which infused the trial with unfairness. It cannot be said that the trial court1s decision to allow rebuttal evidence regarding Petitioner's trustworthiness is an error rising to the level of violation of due process. Petitioner presented extensive character evidence, and opened the door to the testimony of the doctors regarding lack of trustworthiness. Petitioner was also permitted ample opportunity to provide evidence in rebuttal to the prosecution's testimony regarding his lack of trustworthiness. There was likely no error at all, and there certainly was no error in this regard rising to the level of a violation of due process.

With regard to the exclusion of defense inquiry on cross-examination regarding the particulars of the evaluations, a trial court may impose reasonable limits upon cross-examination, including inquiry regarding possible bias. Olden v. Kentucky, 488 U.S. 227, 232 (1988). Where the limitation is unreasonable, however, there may be a violation of the Confrontation Clause resulting from the limitation. Id. In this case, the trial court found that allowing specific inquiry regarding the content of the evaluation of Dr. Pilger was barred as a specific instance of conduct or misconduct. The trial court did permit defense counsel to make general inquiry regarding the evaluation. Also during cross-examination, defense counsel impeached Dr. Dumbauld by showing he gave Petitioner a recommendation without mentioning any lack of trustworthiness. Petitioner was also given the opportunity and did present further character witnesses to rebut the prosecution's claim that he lacked trustworthiness. Upon a review of the record, it cannot be said that the limitation

on cross-examination imposed by the trial court was in any way unreasonable so as to violate Petitioner's rights.

Petitioner's claim that he was denied due process as a result of the admission of evidence by the prosecution of Petitioner's lack of trustworthiness, and also as a result of the limitation of cross-examination of Dr. Dumbauld, are not bases for habeas relief.

(b) Evidence of Birth Control

During Petitioner's testimony, he stated that before having intercourse with Jennifer he asked if she was using any type of birth control, and she responded she was on the pill. In rebuttal, the prosecution presented testimony from Jennifer's gynecologist that he prescribed birth control pills to Jennifer, without being requested to do so, for the treatment of menstrual spotting. Jennifer was to have begun taking the pills August 18, two days after her death. Jennifer's gynecologist testified this was the first time he prescribed birth control pills for Jennifer.

In response, Petitioner sought to elicit testimony from Jennifer's gynecologist that in December 1989 Jennifer told him she was sexually active and using "rubber and rhythm methods" of birth control. Defense counsel argued this evidence that Jennifer was knowledgeable about birth control methods was relevant to her willingness to consent to sexual intercourse with Petitioner. The trial court found the testimony inadmissible pursuant to Section 1103 of the California Evidence Code as evidence of prior sexual conduct. The court noted it was Petitioner's testimony that raised the issue of Jennifer's use of birth control pills, and that the prosecution had narrowly responded to the Petitioner's testimony in this regard by introducing evidence by Jennifer's gynecologist that he had

prescribed the pills for a medical problem, and that she had not started taking the pills. The Court also found the inquiry inappropriate under Section 352 of the Evidence Code since it would be time consuming, and there would be a danger of confusion and potential prejudice.[3]

The right to confront witnesses under the Sixth Amendment includes the right to cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16 (1974). It also includes the right to present relevant evidence. Michigan v. Lucas, 111 S. Ct. 1743, 1746-47(1991). It is within the discretion of the trial court, however, to exclude irrelevant evidence, and to determine which issues are relevant. United States v. Torres, 937 F.2d 1469, 1473 (9th Cir. 1991).

"Even relevant evidence may be excluded in certain circumstances. The right to present relevant testimony 'may. in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process'." Wood v. Alaska, 957 F.2d 1544, 1549 (9thCir. 1992) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)). For example, the Supreme Court has recognized that a state has a legitimate interest in protecting rape victims against unwarranted invasions of privacy and harassment regarding their sexual conduct. Wood, 957 F.2d at 1549.

In Wood, the trial court excluded evidence that the rape victim had posed for Penthouse and acted in pornographic

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[3] The trial court noted, from prior discussion between the parties and the court, that it was aware the prosecution had evidence that Jennifer had engaged in sexual intercourse with a previous boyfriend, had been traumatized by the experience, and bad indicated she would have no further encounters. The court decided it was best to confine the evidence regarding Jennifer's sexual history to that already presented.

movies. The evidence was excluded under Alaska's rape shield law which prohibited the presentation of evidence of prior sexual conduct of a rape victim. On habeas review, the Ninth Circuit engaged in a two-part inquiry: first, it determined whether the excluded evidence was relevant. Second, the court examined whether other legitimate interests outweighed petitioner's interest in presenting the evidence. The court determined that a finding that petitioner's rights under the Sixth Amendment had been violated was appropriate only if the trial court abused its discretion. Id. at 1550.

In the present ease, it is not at all clear that the evidence regarding Jennifer's knowledge about birth control methods is relevant to the issue presented in the case -- whether Jennifer consented to sexual intercourse with Petitioner. "[A] rape victim's sexual history with others only goes to show a generalized attitude toward sex that says little if anything about the victim's attitude toward sex with the defendant...." Wood, 957 F.2d at 1551. In this case, Jennifer's prior sexual history was in no way probative of whether she consented to sexual intercourse with Petitioner. Therefore, the evidence was properly excluded as irrelevant. Even if the evidence was of some marginal relevance, it cannot be said the trial court abused its discretion in excluding the evidence given the potential for confusion of the issues and prejudice.

The exclusion of evidence regarding Jennifer's prior sexual history and/or knowledge end use of birth control did not violate Petitioner's rights under the Sixth Amendment. Therefore, Petitioner's claim in this regard is not a basis for habeas relief.

(4) Ineffective Assistance of Counsel Claim

Petitioner claims he was denied ineffective assistance of

trial counsel in four particulars: (a) counsel failed to appropriately object to the playing of the tape of the October 23, 1991 interrogation; (b) counsel failed to object to certain statements made by the prosecution in closing argument; (c) counsel failed to object to the asking of guilt-assuming hypotheticals by the prosecution; and (d) counsel failed to object to the officer's testimony that on hearing of Jennifer's death, Petitioner appeared to be trying to make himself cry.

In order to prevail on his claim of ineffective assistance of trial counsel, Petitioner must "overcome a strong presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment,' and establish that [counsel's] performance was 'outside the wide range of professionally competent assistance'." Clabournie v. Lewis, 64 F.3d 1373, 1377 (9th Cir. 1995) (quoting Strickland v. Washington, 466 U.S. 668, 690 (1984)). Even if Petitioner establishes that the legal assistance he received at trial was inadequate, Petitioner must go further and demonstrate prejudice as a result of the actions of counsel. In this context, prejudice means that Petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694. Bearing in mind these principles. the Court will address each of Petitioner's grounds for claiming ineffective assistance of trial counsel.

(a) Playing of Tape of Interrogation

Because the playing of the tapes was not error for the reasons set forth above in part B.2.b, it cannot be shown that there was any prejudice resulting from counsel's failure to adequately object. Therefore, this is not a claim upon which

habeas relief should be granted.

(b) Final Argument by Prosecutor

Petitioner argues that several statements made by the prosecution in its final argument were unduly prejudicial, and should have been objected to by his trial counsel. During final argument, defense counsel stated that the defense was "... basically asking you to let him go based on the defendant's testimony. To let him walk out the door based on that testimony." The prosecutor also stated that Petitioner was the "biggest liar you will probably ever see" and then went out to say

> But to get up here and get on the stand and look at you people and tell you that story that he told you in front of the family, this piece of garbage, making up every little bit of it. He's the biggest liar you've ever encountered. He's a lot worse than that. I'm not going to tell you. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else.

The prosecutor also told the jury in final argument "The reason he talked about involuntary manslaughter is because he knows that you know that the defendant is guilty."

Petitioner has failed to show that any of the prosecutor's comments were so egregious as to rise to the level of prosecutorial misconduct. The statements that Petitioner was a liar, and that he had made up a story, and that the story was garbage were all reasonable arguments based upon the evidence presented at trial. Therefore trial counsel's failure to object to the statements cannot be said to have been erroneous. The

implication by the prosecutor that he knew of other evidence of bad acts by Petitioner is slightly troublesome. However, it cannot be said that the statement was so egregious as to infect the trial with unfairness. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Therefore, trial counsel was not ineffective.

(c) Guilt-Assuming Hypotheticals

Petitioner claims his counsel was ineffective for failing to object to several "guilt- assuming" hypotheticals asked by the prosecution. The prosecution asked several of the defense witnesses if their opinion of Petitioner's character would change if they reviewed all the evidence in the case, if the evidence showed beyond a reasonable doubt that Petitioner was guilty, or if they had an opportunity to investigate the truth of all the Petitioner's statements. Upon review of these statements, it is clear that these are not improper guilt-assuming hypotheticals such that they would have been inadmissible at trial. Therefore, trial counsel was not ineffective for falling to object to the questions.

(d) Officer's Testimony that Petitioner was Trying to Make Himself Cry

Petitioner claims his counsel was ineffective for failing to object to testimony by one police officer that on the morning of Jennifer's death Petitioner was acting like he was trying to cry. The California Court of Appeal found this was, in fact, improper lay opinion and should not have been permitted. However, the Court of Appeal found the admission of the evidence was harmless.

Upon review of the facts in this case, it cannot be said that the admission of this statement by the one police officer was

prejudicial. The evidence presented in this case was ample justify Petitioner's conviction. A statement by a police officer regarding his perception of Petitioner's state of mind would have had little if any effect upon the jury. Therefore, it cannot be said that trial counsel was ineffective.

(5) Constitutionality of California Felony Murder

Petitioner argues the California scheme allowing Petitioner to be found guilty of first degree murder based upon an unintentional homicide, and allowing a sentence in excess of what intentional murderers receive, is unconstitutional. Petitioner cites no authority for his contention, and does not even state what constitutional guarantee is violated by the California laws.

In Tison, 481 U.S. 137 (1987), the Court held that the Eighth Amendment does not prohibit the death penalty as being unconstitutionally disproportionate in the case of a defendant whose participate in a felony resulting in murder, even where the defendant's mental state is only one of reckless indifference. The Petitioner has cited no authority to the contrary. Therefore, Petitioner has not stated any basis for relief with regard to the constitutionality of his conviction or sentence for first degree murder.

Conclusion

For the foregoing reasons, it is the recommendation of Magistrate Judge Battaglia that the Petition for a Writ of Habeas Corpus be DENIED. This report and recommendation will be submitted to the United States District Judge assigned to this case, pursuant to the provisions of 28 U.S.C. §636(b)(l) (1988). Within thirty (30) days after this report and recommendation is mailed, any party may file written objections with the court and

serve a copy on all parties. The document should be captioned "Objections to Report and Recommendation," Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. Martinez v. Ylist, 951 F.2d 1153 (9th Cir. 1991).

Dated: 2/12/97

ANTHONY J. BATTAGLIA
United States Magistrate Judge

cc: Judge Moskowitz
All Counsel of Record

FEBRUARY 23, 1998

ORDER ADOPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION DENYING PETITIONER'S 28 U.S.C. §2254 PETITION FOR WRIT OF HABEAS CORPUS

FILED
FEB. 23, 1998
U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
BY // DEPUTY

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SAMSON DUBRIA,	) Civil NO.96-CV-657K(AJB)
	)
Petitioner,	) ORDER ADOPTING
	) MAGISTRATE JUDGE'S
v.	) REPORT AND
	) RECOMMENDATION
D.A. SMITH, Warden, California	) DENYING PETITIONER'S
State Prison Corcoran, California,	) 28 U.S.C. §2254 PETITION
	) FOR WRIT OF HABEAS
Respondent.	) CORPUS
	)

On April 12, 1996, petitioner, a state prisoner proceeding by and through counsel, filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 (`Petition'). United States Magistrate Judge Anthony J. Battaglia filed a Report & Recommendation (R&R) on February 13, 1997, which was submitted to United States District Court Judge Barry Ted Moskowitz for review pursuant 28 U.S.C. §636(b)(1) (1988). In the R&R, Magistrate Judge Battaglia receommends thaat the Petition be denied.

Petitioner filed Objections to the R&R on March 10, 1997.

Respondent did not reply to the Objections Judge Moskowitz recused himself from the case on February 6, 1998, and the case was reassigned to this court.

I. PROCEDURAL HISTORY

Petitioner was found guilty of murder together with a special circumstance of murder in the commission and attempted commission of rape following a jury trial in state court. The jury found the murder to be of the first degree. The jury also found petitioner guilty of rape by use of drugs and of administering a drug in order to enable and assist himself to commit a felony. On April 16. 1993, the state court sentenced petitioner to state prison for life without the possibility of parole for the special circumstance murder.

Petitioner filed an appeal with the California Court of Appeal, Fourth Appellate District, Division One,. as well as a Petition for a Writ of Habeas Corpus. Both the appeal and the petition were denied by the Court of Appeal on July 18, 1995. Petitioner's petition for review with the California Supreme Court was also denied on October 19, 1995. Petitioner filed a Petition for Writ of Certiorari with the United States Supreme Court which was denied on February 20, 1996. Respondent does not dispute that petitioner has exhausted his available state remedies.

The Petition raises six claims for relief: (1) insufficiency of the evidence, (2) violation of the Fifth Amendment; (3) violation of due process by instructional error; (4) violation of due process in evidentiary errors; (5) ineffective assistance of counsel; and (6) unconstitutionality of sentence.

II. BACKGROUND

The court takes the following facts from the R&R. The Magistrate Judge garnered the following information from the findings of fact in the July 18, 1995 unpublished opinion of the California Court of Appeal, Fourth Appellate District, Division One. These facts are entitled to a presumption of correctness under former 28 U.S.C. § 2254(d). See Paradis v. Arave, 130 F.3d 385, 390 (9th Cir. 1997); Poland v. Stewart, 117 F.3d 1094, 1103 (9th Cir. 1997)

A. Prosecution Case

1. Death of Jennifer Klapper

At approximately 3:09 a.m. on August 16, 1991, the Carlsbad Police Department was dispatched Room 224 at the All-star Inn in Carlsbad, California. The officer responding was admitted to the room by petitioner. Upon the officer's arrival, Jennifer Klapper was not breathing and had no pulse. Ms. Klapper was lying on the bed closest to the door, and the other bed had not been slept in. The officer and Petitioner began two person cardiopulmonary resuscitation (CPR). The Carlsbad police officer noticed no chemical odor in the room, and paid no attention to Ms. Klapper's face.

Firemen and paramedics arrived shortly thereafter. Ms. Klapper was moved from the bed to the floor. CPR was continued and other life-saving and monitoring procedures were undertaken, including the placing of an oxygen mask over Ms. Klapper's mouth and nose. None of these emergency personnel smelled a chemical odor in the room. Ms. Klapper was transported by ambulance to Tri-City Hospital, where further attempts were made to resuscitate her. All resuscitation attempts were to no avail. The emergency room doctor found no cause for Ms. Klapper's death.

2. Relationship Between Petitioner and Ms. Klapper

Jennifer Klapper, age 20, became friends with Petitioner, a 28 year old resident physician, at the medical library at Good Samaritan Hospital in Cincinnati, Ohio. The relationship between Ms. Klapper and the Petitioner was not a romantic one. Ms. Klapper had stated that she did not find Petitioner romantically desirable, and at the time of her death, was romantically involved in another relationship. Ms. Klapper and her boyfriend had talked of marriage. Several times after reaching California, Ms. Klapper called her boyfriend, including one call only hours before her death. During the phone conversations, Ms. Klapper told her boyfriend that she loved and missed him.

Petitioner had traveled to California to attend a class reunion, and asked Ms. Klapper if she wanted to along. Ms. Klapper discussed the trip with her boyfriend, explained her relationship with petitioner was merely a friendship, and expressed reluctance to go on the trip because, among other reasons, she would be away from her boyfriend. Ms. Klapper had expressed to another friend that she was uncomfortable about going to California with petitioner, since she did not know what he expected. Ms. Klapper stated to that friend that she did not find petitioner physically attractive and did not intend to have a physical relationship with him. Ms. Klapper's sister also overheard a telephone conversation in which Ms. Klapper told petitioner that they were just friends and if he expected to have a physical relationship while on the trip, she would have to cancel her plans to go.

3. Physical Findings and Cause of Death

The emergency room physician was unable to determine

why Ms. Klapper had suddenly died. Several hours after her death, Ms. Klapper's body was examined by a coroner's investigator. The investigator noticed the lycra pants Ms. Klapper was wearing were on inside out. Ms. Klapper was wearing jewelry, including an earring in her pierced right earlobe, but no earring in the pierced left earlobe. The investigator noticed scratches on Ms. Klapper's face including a half moon scratch on her left cheek.

4. Chloroform Poisoning

At petitioner's trial, Dr. Lucien Morris. an eminent anesthesiologist with extensive practical and experimental knowledge of chloroform, explained the history and nature of chloroform. Death can occur from the inhalation of chloroform in several ways. One is a "relative overdose". A lethal relative overdose occurs when a relatively small amount of chloroform is suddenly inhaled. The concentration of chloroform rises quickly, causing disruption of electrical activity in the heart. The amount of chloroform required to cause a relative overdose is very small.

Death may also result from a "frank overdose" of inhaled chloroform.. A frank overdose occurs when a large amount of chloroform is inhaled. Such inhalation causes a depression of several body systems, including the circulatory and respiratory systems to the extent that death can result.

Dr. Morris reviewed the medical, toxicological, and police reports in this case. He concluded that assuming chloroform was administered to Ms. Klapper in the motel room, it was possible its smell dissipated before the arrival of the police. Dr. Morris concluded Ms. Klapper's death resulted from a relative overdose of inhaled chloroform.

5. Petitioner's Statements.

Petitioner's statement to the paramedics at the All-star Inn, was that he had gone to the bathroom, and while in the bathroom he heard a cry or moan and then a 'thud" as if someone had fallen. Petitioner returned to the room and found Ms. Klapper on the floor. At that time, petitioner did not tell the paramedics or police that the two had sexual intercourse that night.

Later that morning at the hospital, petitioner talked with other officers, and repeated his rendition of the facts involving finding Ms. Klapper on the floor of the motel room. Petitioner told the officers that he had examined Ms. Klapper, found no pulse, and started CPR. He then left the room, went to the motel office, and asked the clerk to call 911. Petitioner told the officers he ran back to the room, discovered he had locked himself out, returned to the office to get another key, and return to the room. Petitioner stated he did not know why be did not use the telephone in the motel room to call 911. Petitioner did tell these officers that he and Ms. Klapper had sexual intercourse that evening, and that they were just friends. Later that morning, back at the All-star Inn, petitioner spoke with other officers. Petitioner told these officers that be and Ms. Klapper had been to a taping of the Johnny Carson Show, they had a pizza, bought some alcoholic beverages in Burbank, California and then drove to Carlsbad. Petitioner and Ms. Klapper were going to stay at a campsite at San Elijo State Beach, but arrived instead at the All-star Inn at about 11:30 p.m. There, they watched the show they had seen taped earlier in the day. Ms. Klapper complained of dizziness and headaches, and petitioner told the officers Ms. Klapper had a history of headaches. Petitioner then again restated his version of events regarding finding Ms. Klapper on the floor, administering CPR, leaving the room, and locking himself out.

Petitioner also told the officers that the paramedics arrived between five and fifteen minutes after he left the room. Petitioner stated he told paramedics he would follow them to the hospital, but stated he returned to the room to get information about reaching Ms. Klapper's family and about five minutes later departed. Petitioner stated this was only an estimate of time, that he was in a frenzy and stayed at the motel for a few minutes to catch his breath. Petitioner stated be told the paramedics he would follow them to the hospital, but meant he would follow later and not immediately. Petitioner told the officers that he and Ms. Klapper had intercourse that night, that he had a beer and mixed drink that night, and that Ms. Klapper had several sips of the drink. Petitioner told the officers that he did not know what had killed Ms. Klapper, and that they had been together all day and all evening except for short times when she used the telephone.

By October of 1991, coroner's investigators had determined Ms. Klapper's death was the result of chloroform intoxication. Petitioner was interviewed in New Jersey by Carlsbad police detectives on October 23, 1991. The officers sketched a theory for petitioner that petitioner had wanted to have sex with Ms. Klapper, used a little too much chloroform, resulting in her death. Petitioner denied having any knowledge of chloroform, having ever used chloroform, and killing Ms. Klapper. Petitioner stated that the act of intercourse that evening was consensual. Petitioner explained to the officers that he and Ms. Klapper had a reservation at a camp ground, but were scheduled to arrive at 7 or 8:00 p.m. Petitioner had told Ms. Klapper that they were not going to make it to the campsite in time, so petitioner found a motel with a low rate since the two were trying to save money, petitioner registered as a single and obtained a single room with two beds. Petitioner stated that Ms. Klapper agreed with this arrangement.

6. Check-In Procedures at San Elijo State Beach

Petitioner had a reservation for a camp site at the San Elijo State Beach for August 15-17, but records indicated he did not appear to claim the campsite. The entrance booth at the park closes between 10:30 and 11:00 p.m., but the park remains open. A note is placed in the window of the booth telling late comers which campsite has been assigned to them. Nothing on the park's recorded telephone message stated the reservations of late arriving campers would not be honored.

B. Defense Case

1. Rapist Profile and Character Evidence

Dr. Cynthia Stout, a marriage, family and child counselor, and Dr. Edward Conolley, a clinical psychologist, tested and took a history of petitioner. Both testified, as defense witnesses, that a profile existed for the majority of rapists and they found petitioner did not fit that profile. Petitioner also offered a series of witnesses who testified to his compassion. empathy, trustworthiness, and other traits of good character.

2. Medical Testimony

Dr. George Schwartz, a Board certified emergency room physician, reviewed the medical and police reports as well as the testimony in the case and researched the literature concerning chloroform. Dr. Schwartz agreed with most of the conclusions reached by the prosecution experts concerning chloroform, including that Mr. Klapper died from an adverse reaction to the presence of chloroform in her body. Dr. Schwartz, however, believed Mr. Klapper had ingested rather than inhaled the

chloroform as had been concluded by the prosecution's expert. Dr. Schwartz's calculations, based on the autopsy report, led him to believe that there was more than half a teaspoon of chloroform in Mr. Klapper's stomach contents at the time of her death. This amount was consistent with ingestion of the substance but not inhalation. Dr. Schwartz indicated that, while still unusual, chloroform's use to produce giddiness for recreational purposes was on the rise. Chloroform was both ingested and inhaled for such purpose.

Dr. Schwartz also believed that the injuries to Mr. Klapper's face were consistent with those which occurred during attempts at resuscitation. The doctor disagreed with the prosecution's expert testimony that since the injuries had bled they necessarily occurred before death. Dr. Schwartz believed CPR could have created enough circulation to cause blood seepage into post mortem facial injuries.

Dr. Schwartz concluded, given the electrical activity noted by the paramedics in Mr. Klapper's heart, death must have occurred from five to thirty minutes before the paramedics arrived. Dr. Schwartz believed the smell of chloroform would persist in a closed room for eight to twelve hours and would have been smelled by emergency personnel when they arrived. Oral ingestion would not have caused a great deal of vaporization, and the doctor believed that attempts at getting rid of the smell could be successful in a relatively short period of time.

4. Petitioner's Testimony

Petitioner testified in his own defense, stating he met Mr. Klapper at the library at Good Samaritan Hospital in Cincinnati, Ohio. Eventually Mr. Klapper was laid off from the library. However the two maintained a relationship. Petitioner and Mr.

Klapper went out on seven "formal dates," including going out for dinner, playing tennis, and simply going for walks. Petitioner had kissed her for the first time in April of 1991, and in May of 1991, after bowling the two kissed and "cuddled" in the back seat of petitioner's car.

In March of 1991, the two began discussing a trip to California. Petitioner told Mr. Klapper he was able to purchase a round trip ticket to Los Angeles that would allow two persons to fly for $189. In June, 1991, petitioner left Ohio and moved to New Jersey. The two communicated by telephone and continued discussing the California trip. Eventually, the two agreed to come to California and petitioner arrived before Mr. Klapper and picked her up on August 11, 1991 at the airport.

Petitioner and Mr. Klapper went to petitioner's parents' house, where petitioner slept on the living room couch and Mr. Klapper slept in one of the bedrooms. The two spent several days seeing the sites. On August 15 at 4:00 p.m.. petitioner and Mr. Klapper watched the taping of the Johnny Carson show. The taping lasted about 2½ hours. When it was over, the two departed with camping gear for the San Elijo State Beach campground. On the way, they stopped for dinner and picked up a beer and a fuzzy navel mixed drink. It was 9:30 p.m. before the two left for the campground.

Petitioner and Mr. Klapper stopped for gas, and petitioner called the campground. He was told visitors were not accepted after 10:30 p.m.. Since it was already after 10:30 p.m. and they did not know how to get to the campsite, they decided to seek other accommodations for the night. Petitioner registered at the All-star Inn. The pair settled into the room at about 11:30 p.m., and Mr. Klapper turned on the television to watch the Johnny Carson Show they had seen taped earlier in the day. Mr. Klapper

lay on one of the two beds, and Petitioner walked between the beds, handed her the fuzzy navel drink and turned off the light on the nightstand. Mr. Klapper moved over on the bed, indicating petitioner should lie down next to her. Petitioner put his arm around Mr. Klapper and the two began to "cuddle". The two talked, kissed, and eventually had intercourse. Before having sexual relations petitioner asked Mr. Klapper if she was using any type of birth control method. Mr. Klapper stated she was on the pill.

Petitioner again testified regarding the sequence of events leading up to Mr. Klapper's death, consistent with his earlier statements to police. Thereafter, petitioner stated that he was told by the fire captain they would be taking Mr. Klapper to Scripps Hospital in Encinitas and that he drove there. Upon arriving, petitioner was told that Mr. Klapper had not been brought there, he was told she might have been taken to Tri-City Hospital and was given directions to that location. Petitioner went to Tri-City Hospital and found Mr. Klapper had been pronounced dead.

C. Prosecution Rebuttal

1. Character Evidence

The prosecution offered the testimony of three doctors who had worked with petitioner. The doctors did not believe petitioner was trustworthy and did not believe petitioner had a good reputation for trustworthiness.

2. Evidence Concerning Birth Control Pills

Ms. Klapper's gynecologist testified that in August of 1991, Ms. Klapper complained of menstrual spotting between

her periods. On August 2, 1991, the doctor, without Ms. Klapper's request that he do so, prescribed a cycle of birth control pills to treat the problem. The doctor had never before prescribed birth control pills for Ms. Klapper. Ms. Klapper was given two packages of pills, and she was to begin taking the pills on August 18, 1991, two days after her death. In Ms. Klapper's belongings turned over to her father after her death was a single packet of birth control pills with none of the pills missing.

3. Rapist Profile

Forensic psychiatrist Dr. Melvin Goldzband testified there was no such thing as a rapist profile which can predict whether a person will commit rape.

4. Recreational Use of Chloroform

Dr. Bushong, the emergency room doctor who treated Ms. Klapper, stated that he had never heard of the use of chloroform for recreational purposes, and had never heard of any patient at his hospital, other than Ms. Klapper, who had died from an overdose of chloroform.

5. Chloroform Intoxication

Dr. Graham Jones, a pharmacologist and toxicologist familiar with chloroform, concluded Dr. Schwartz was mistaken when he concluded Ms. Klapper had ingested rather than inhaled the chloroform found in her system. Dr. Jones demonstrated mathematically that Dr. Schwartz was mistaken when he concluded there was from a half to one teaspoon of chloroform in Ms. Klapper's gastric contents at the time of her death, noting the actual amount of chloroform present was about one thousand part of one teaspoon. Dr. Jones concluded that Ms. Klapper did

not ingest chloroform, and that the amount of chloroform found in Ms. Klapper's body fluids was consistent with those of a person who died from a fairly quick inhalation of a fairly high concentration of chloroform. Dr. Jones testified it was certainty possible for the odor of chloroform to dissipate in half hour to an hour.

D. Defense Surrebuttal

Dr. Schwartz agreed he had made an error concerning the amount of chloroform in Ms. Klapper's gastric contents. Dr. Schwartz still believed it was possible Ms. Klapper had ingested rather than inhaled chloroform. Dr. Schwartz believed other causes of death were possible, including aspiration, noting aspirated material was found in Ms. Klapper's lungs.

The defense also recalled one of its psychological experts who stated the individual who would commit the crimes in this case would have signs of mental disturbance that would have been detected in testing, and that petitioner did not fit the psychological profile of a rapist.

E. Prosecution Surrebuttal

Dr. Jariwala testified that Ms. Klapper did not die from aspiration, and again discounted all possible causes of death except chloroform intoxication.

The second packet of birth control pills given to Ms. Klapper by her gynecologist was found in a cabinet in the bathroom used by Ms. Klapper at her home.

III. STANDARD OF REVIEW

The district court reviews de novo those portions of the R&R which are challenged by the petitioner's Objections and may accept, modify, or reject the findings contained therein. See 28 U.S.C. § 636(b)(1). Petitioner filed this Petition on April 12. 1996, prior April 24, 1996, the effective date of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). Pub. L. No . 104-32. 110 Stat. 1214. As held in the R&R, the amendments made by thc AEDPA thus, do not affect this appeal. See Paradis, 130 F.3d at 390 (citing Lindh v Murphy, __ U.S. __, 117 S. Ct. 2059, 138 L.Ed.2d 481 (1997); Jeffries v. Wood, 114 F.3d 1484 (9th Cir. 1997) (en banc)). Hence, statutory references the provisions governing federal habeas corpus as they existed existed before April 24, 1996.

Title 28, United States Code, section 2254(a), sets forth the following scope of review for federal habeas corpus claims

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgement of a State court only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.

28 U.S.C. § 2254(a) (1994) (emphasis added). See Hernandez v. Ylst, 930 F.2d 714, 719 (9th Cir. 1991), 28 U.S.C. §§ 2241(e)(3); Rule 1(a)(1), 28 U.S.C. foll. § 2254.

Thus, each claim in a federal habeas corpus petition must allege a deprivation of one or more federal rights to present a cognizable claim pursuant to § 2254. A state's interpretation of its own laws affords no basis for federal habeas corpus relief because no federal constitutional question arises. Estelle v McGuire, 502 U.S. 62, 67-68 (1991) (holding that federal habeas

corpus relief does not lie for errors of state law, and federal court may not reexamine state court determinations on state law issues). The purpose of habeas corpus proceedings under § 2254 is to require state convictions meet federal constitutional requirements applicable to the states. A federal district court does "not sit as a 'supper' state supreme court" with general supervisory authority over the proper application of state law. Smith v. McCotter, 780 F.2d 697, 700 (5th Cit. 1986); see Lewis v. Jeffers, 497 U.S. 764, 781) (1990) (federal habeas court must respect state court's application of its own law); Jackson v. Ylst, 921 F.2d 582 (9th Cir. 1990) (federal court has no authority to review state's application of state law). Instead, federal courts may only intervene in state judicial proceedings to correct errors of federal constitutional magnitude. Oxborrow v. Eikenberry, 877 F.2d 1395, 1400 (9th Cir. 1989) (stating that federal courts are not concerned with errors of state law unless they rise to level of constitutional violation).

With respect to evidentiary hearings, the Ninth Circuit Court of Appeal has repeatedly stated the standard for determining whether to grant an evidentiary hearing is as follows:

> A habeas petitioner is entitled to an evidentiary hearing on a claim if (1) the petitioner's allegations, if proved, would entitle him to relief, and (2) the state court trier of fact has not, after a full and fair hearing, reliably found the relevant facts. No hearing is required if there no disputed facts and the claim presents a purely legal question.

Williams v. Calderon, 52 F.3d 1465, 1484 (9th Cir.) (citations and internal quotation marks omitted), cert. denied, 116 S. Ct. 937 (1996), Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995)(upholding district court's denial of evidentiary hearing

request because petitioner had failed to state facts which, if proved, would have entitled him to relief), cert. denied, 116 S. Ct. 718 (1996).

IV. DISCUSSION

As noted previously, the Petition raises six claims for relief: (1) insufficiency of the evidence; (2) violation of the Fifth Amendment; (3) violation of due process by instructional error, (4) violation of due process in evidentiary errors; (5) ineffective assistance of counsel, and (6) unconstitutionality of sentence. The Magistrate Judge denied petitioner's claim for relief, and petitioner filed Objections which challenge the R&R.

Along with specific objections, petitioner reiterates those arguments submitted in his Petition and states that he objects generally to the entirety of the Magistrate Judge's recommendation that the Petition be denied. According to 28 U.S.C. § 636(b)(1), "a judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject or modify, in whole or in part, the findings or recommendations made by the magistrate." After a de novo review of the R&R and petitioner's arguments, this court rejects petitioner's general objection to the R&R and accepts the findings contained therein to the extent petitioner does not object to them specifically. Accordingly, the court shall address Petitioner's specific objections to the R&R in the order presented in his Objection.

A. Insufficiency of Evidence

Petitioner claims that there was insufficient evidence to convict him. His argument consists of two points which the

Magistrate Judge rejected. First, petitioner claims that there was no factual basis upon which a reasonable jury could have found him guilty beyond a reasonable doubt of the murder, rape, and rape special circumstance. Second, petitioner claims that his rights to due process were violated by the presentation by the prosecution of false, contaminated toxicological evidence.

1. Insufficiency of Evidence

As held in the R&R, where a state prisoner claims, under 28 U.S.C. Section 2254, that he is entitled to relief due to the insufficiency of the evidence, the relevant inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." United States v. Riggins, 40 F.3d 1055, 1057 (9th Cir. 1994)(quoting Jackson v. Virginia, 443 U.S. 307, 319). The Magistrate Judge held that the evidence in the case was sufficient to support the finding that petitioner was guilty of the crimes charged.

Petition claims that the R&R incorrectly stated that the petitioner "accept[ed] that Jennifer died from chloroform intoxication." R&R at 13. Instead petitioner contends that he merely assumed arguendo that the evidence of the chloroform was accurate and that the small amounts testified to in the trial were actually found in Jennifer's body fluids." Traverse at 14. This alleged inadvertence in the R&R does not affect the overall evaluation of the evidence presented in this case. The Magistrate Judge evaluated all of the evidence presented against defendant at trial. The R&R concluded that there was sufficient evidence to convict petitioner under the Jackson rule. After reviewing the record de novo this court agrees with the Magistrate Judge's findings. The apparent misstatement in the R&R pointed out by

petitioner, does not affect the conclusion that "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Riggins, 40 F.3d at 1057 (quoting Jackson, 443 U.S. AT 319).

In addition, petitioner argues that the evidence and theory of guilt presented by the prosecution against him constituted "sheer speculation" and "speculative inferences." The State compiled and presented a circumstantial case to the jury. However, the fact that the prosecution's case consisted of circumstantial evidence does not mean that there was insufficient evidence to support the verdict. The summary of evidence presented earlier in this ruling is illustrative of the fact that "after viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Id.

2. Claim of False, Contaminated Toxicological Evidence

Petitioner argues that he was denied due process of law by the presentation of false, contaminated toxicological evidence by the prosecution at trial. In support of his proposition that such claim supports habeas relief, petitioner cites to United States v. Young, 17 F.3d 1201, 1203-04 (9th Cir. 1994). The Young court held the following: "A conviction based in part on false evidence, even false evidence presented in good faith, hardly comports with fundamental fairness. Thus, even if the government unwittingly presents false evidence, a defendant is entitled to a new trial 'if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different.'" Young, 17 F.3d at 1203-04 (quoting United States v. Endicott, 869 F.2d 452, 455 (9th Cir. 1989)). This court agrees with the Magistrate Judge's analysis of this case, the R&R concluded that this case is inapposite in this instance. Most important to this analysis, the

Magistrate Judge found that petitioner makes no showing that the toxicological evidence was "false." As a result, Young does not apply. Instead, petitioner merely challenges the prosecution's theory of the case.

In his objection to this finding, petitioner reiterates the same arguments. He states that he "did produce evidence sufficient to show through both mishandling of the body fluids and tissue samples and an incomplete autopsy . . . leading to a speculative diagnosis, the picture painted for petitioner's jury was false and led to the false diagnosis that the cause of death was chloroform poisoning." Objections at 2-3. In essence, these contentions are merely challenges to the prosecution's case; petitioner presents a battle of the experts and requests that the court resolve the matter in his favor. Though petitioner disputes the validity of the evidence and the conclusion drawn therefrom, petitioner has not demonstrated that the evidence was "false." Consequently, the court agrees with the conclusions contained in the R&R with respect to this issue.

B. Miranda Claims

Petitioner raises two claims with regard to alleged violations of his rights under Miranda v. Arizona, 384 U.S. 436 (1966). First, petitioner claims that when he was questioned by officers in New Jersey on October 23, 1991, he was "in custody" for purposes of Miranda and should have been advised of his rights. He claims, therefore, that any statements taken from him should have been excluded at trial. Second, petitioner claims that his due process rights were violated when a tape recording of the interview was played for the jury, a transcript of the interview was given to the jury, and the prosecution exploited inconsistencies in statements made during the interview.

The following facts are relevant to the "in custody" inquiry regarding the alleged Miranda violation and are taken from the July 18., 1995 unpublished decision of the California Court of Appeal. These facts are entitled to a presumption of correctness under former 28 U.S.C. § 2254(d).

After his initial interview with the Carlsbad Police Department on August 16, 1991, petitioner returned to his home in New Jersey. On the morning of October 23, 1991, two officers from the Carlsbad Police Department arrived at the New Jersey complex where petitioner lived, along with Sergeant Gannon of the Morris County New Jersey prosecutors's office. All of the officers were in plain clothes and their car was unmarked. The officers believed petitioner was a prime suspect in Ms. Klapper's murder.

As the officers drove up to the complex, they saw petitioner walking toward a parking lot. One of the Carlsbad officers got out of the car and asked petitioner if he would go with the officers to an office in town to talk. Petitioner agreed to go but wanted to call the hospital whereupon the officer suggested petitioner call from the office. Petitioner was told he would be brought back after the interview. On the ride to the office, petitioner and the officers discussed the weather, the area in which petitioner lived, the officer's flight from California., and other topics not related to the homicide. Petitioner asked how long the interview would take and was told it would take between one and two hours. No force or suggestion of force was used in contacting petitioner, and no restraints were employed by the officers in transporting petitioner.

Petitioner was taken to the prosecutor's office located in an office building. He was not taken to a police station. Petitioner asked and was allowed to make several telephone calls privately

from a lieutenant's office. Petitioner was offered food and use of the facilities, and then was questioned by the Carlsbad Police officers in an interview room. The officers told petitioner the door to the room was unlocked and that he could leave at any time. Petitioner was also told he would be given a ride home. Petitioner told the officers they could ask him anything they liked.

The officers obtained some background information from petitioner and then told him if he had anything to do with Ms. Klapper's death he should tell them about it. The trial court found that the tone of the officers' questions and comments was that the officers believed petitioner was involved in causing Ms. Klapper's death. Petitioner told the officers he had nothing to do with Ms. Klapper's death. The investigators asked if petitioner would be willing to submit to a polygraph test; petitioner stated that he would and that the test would show that he had nothing to do with Ms. Klapper's death.

The officers went on to tell petitioner they believed he was responsible for Ms. Klapper's death but that her death was probably an accident. Petitioner asked the officers what evidence they had whereupon the officers said they knew what happened and it was time petitioner told the truth. The officers told petitioner that Ms. Klapper died of chloroform intoxication.

The interview became a sparring session, with the officers explaining how they believed petitioner caused Ms. Klapper's death and with petitioner denying he caused Ms. Klapper's death. Petitioner recounted for the officers his version of what happened on the trip and the night Ms. Klapper died.

At one point, petitioner requested that the interview stop so he could call his family. Petitioner was allowed to make this telephone call, and thereafter, petitioner stated that he wished to

make no further statements. After the officers asked petitioner questions not directly related to Ms. Klapper's death, petitioner asked what would happen next. The officers told petitioner they would take him home and would continue working on the case. The officers then proceeded to ask additional questions and make additional comments regarding the case.[1] Thereafter the interview ended, and one of the Carlsbad officers drove petitioner home.

At no time was petitioner told he was under arrest. In fact, petitioner was told on several occasions he was not under arrest, that he was free to go at any time and that he would be given a ride either home or to work.

1. Claim of Miranda Violation

Warnings under Miranda v. Arizona are required to be given prior to "custodial interrogation." Custodial interrogation is defined as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." Miranda, 384 U.S. at 444. In a noncustodial setting, where the person being questioned has not been formally arrested or otherwise formally detained, "Miranda warnings are required only where there has been such a restriction on a person's freedom as to render him 'in custody.'" Oregon v. Mathiason, 429 U.S. 492, 495 (1977). The Court "must examine all of the circumstances surrounding the interrogation but the ultimate inquiry is simply whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.'" Stansbury v. California, 114 S. Ct. 1526, 1529 (1994)(quoting California v. Beheler, 463

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[1] The trial court excluded evidence of the interrogation after petitioner stated the he no longer wanted to speak, holding that the officers at that point should have ceased their interview with the petitioner.

U.S. 1121, 1125 (1983)). An officer's knowledge or belief regarding the guilt of the person being interviewed are relevant only insofar as they are conveyed by word or deed to the person being interviewed, and to the extent those beliefs "would affect how a person in the position of the individual being questioned would gauge the breadth of his or her 'freedom of action.'" Stansbury, 114 S. Ct. at 1530.

The factual determination of the state court regarding the circumstances surrounding the interrogation are entitled to a presumption of correctness under the former Section 2254(d). However, the ultimate determination of whether a person is "in custody" for purposes of requiring Miranda warnings is a mixed question of fact and law which must be reviewed by the federal court independently based upon the facts. Thompson v. Keohane, 116 S. Ct. 457, 465 (1995).

Though the interview between the officers and petitioner contained some element of coercion, it cannot be said that petitioner's interview in this case took place under circumstances as to lead a reasonable person to believe that he was no longer free to leave. See U.S. v. Hudgens, 798 F.2d 1234, 1236 (9th Cir. 1986)("Every police interview has coercive aspects; instead the 'ultimate question is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest.'")(citations omitted). This court agrees that the analysis contained in the R&R which concluded that petitioner was not in "custody" for the purposes of Miranda.

The courts have used several factors to determine if a particular scenario constitutes a state of custody for the reasonable person. See U.S. v. Beraun-Panez, 812 F.2d 578, 580 (9th Cir.) modified, 830 F.2d 127 (9th Cir. 1987)(pointing to the language used to summon an individual, the confrontation, the

physical setting, the duration, and the degree of pressure of an interrogation as factors in determining whether an accused is in custody). In this case, petitioner voluntarily accompanied the officers who approached him at his apartment complex in plain clothes and in an unmarked car. The officers allowed petitioner to make a number of private phone calls at the prosecutor's office before the interrogation began. A reasonable person would less likely feel isolated given this freedom to communicate with others. See Beraun-Panez, 812 F.2d at 582 ("The Supreme Court in Miranda noted that isolating a subject from others, who might lend moral support to the person questioned and thereby prevent inculpatory statements was a technique of psychological coercion.") He offered to cooperate with the investigators once he was confronted and asked questions of the investigations regarding the evidence in the case.

Petitioner stresses that although he was told that he was free to go prior to the point of time the accusatory interrogation began, once the pointed interrogation began, a reasonable person would not have believed he was still free to go. However, the officers repeatedly told petitioner that he was free to leave and that the door to the room was unlocked. When petitioner expressed a desire to take a break from the questioning to call his family, he was permitted to make the telephone call in private. After further questioning, he was given a ride back home. As noted in footnote one, the trial court excluded evidence of the interrogation after petitioner stated he no longer wanted to speak. Under all of the circumstances, it cannot be said that the circumstances surrounding the interview were so coercive as to render the petitioner "in custody" and require the giving of Miranda warnings. Therefore, petitioner's argument that his Miranda rights were violated by the October 23, 1991 interview does not justify relief.

2. Introduction of Taped Statements

Petitioner argues that his right to due process was violated by the introduction in evidence of his statements taken during the interview on October 23, 1991. During the testimony of the interrogating officers, the unedited tape of the October 23, 1991 interview was played and the jurors were provided transcripts of the recording. As the R&R states, the interview on October 23, 1991, was essentially a sparring session, with the officers expressing their belief in petitioner's guilt, and his involvement in Ms. Klapper's death. In his Petition and Objections, petitioner argues that the playing of the tape recording and the provision of the transcript of the interview to the jury was a highly prejudicial and inflammatory means of putting before the jury otherwise inadmissible opinions and statements of the chief investigating officer regarding petitioner's guilt. Petitioner argues that the introduction of the tape recorded interview, both individually and when combined with the alleged Miranda violation, violated his right to due process.

This court agrees with the findings of the R&R that the introduction of the tapes was clearly not an erroneous mistake on the part of the trial court nor did the introduction of the tapes rise to the level of violating fundamental fairness. The R&R held that errors regarding state court evidentiary rulings ordinarily do not rise to the level of constitutional violations. Estelle v. McGuire, 502 U.S. 62 (1991). The category of errors which violate "fundamental fairness" so as to amount to a violation of due process is narrow. Id. at 72. The inquiry is whether the alleged error "so infused the trial with unfairness as to deny due process of law." Id. at 75 (quoting Lisenba v. California, 314 U.S. 219, 228 (1941)). In this case, the jury was instructed and admonished that the officer's statements were not admitted for their truth but only to be considered as giving meaning and context to the

petitioner's statements. Therefore, it is not at all clear that the introduction of the statements was erroneous. Even if the introduction of the statement was erroneous, it cannot be said that the introduction of the tape recorded interview or the transcript rises to the level of violating fundamental fairness. Therefore, petitioner's argument that he was denied due process is not a sufficient basis for the granting of habeas relief on his Petition.

C. Violation of Due Process by Instructional Error

Petitioner argues that his rights to due process were violated by the trial court's failure both to give lesser included offense instructions regarding rape and to give a proper reasonable doubt instruction. The Magistrate Judge concluded that petitioner's right to due process was not violated by either the state court's failure to give a lesser included offense instructions regarding rape and the contents of the court's reasonable doubt instruction. In the Objections, petitioner simply reiterates those arguments presented in his Petition regarding these issues. After reviewing the issues de novo this court agrees with the ruling in the R&R with respect to these arguments and incorporates it herein by reference.

D. Due Process Violation As a Result of Evidentiary Errors

Petitioner claims his right to due process was violated as a result of evidentiary errors by the trial court. First, petitioner argues the trial court erred in admitting rebuttal evidence by the prosecution relating to his alleged lack of trustworthiness. Petitioner asserts this error was exacerbated by limitations placed upon defense counsel in cross-examination of the rebuttal

witnesses. Second, petitioner argues the trial court erred in excluding inquiry regarding Ms. Klapper's previous use of birth control methods.

1. Lack of Trustworthiness

The R&R extensively details the testimony presented regarding petitioner's character and reputation. This court shall not reiterate the facts of the testimony presented and, hereby, incorporates the facts in this section of the R&R. The Magistrate Judge concluded that it cannot be said that the trial court's decision to allow rebuttal evidence regarding petitioner's trustworthiness is an error rising to the level of violation of due process. Petitioner presented extensive character evidence on his traits of compassion, empathy, and other traits of good character and opened the door to the testimony of the doctors regarding lack of trustworthiness. Petitioner was also permitted ample opportunity to provide evidence in rebuttal to the prosecution's testimony regarding his lack of trustworthiness. There was likely no error at all, and there certainly was no error in this regard rising to the level of a violation of due process.

With regard to the exclusion of defense inquiry on cross-examination regarding the particulars of the petitioner's professional evaluations, a trial court may impose reasonable limits upon cross-examination, including inquiry regarding possible bias. Olden v. Kentucky, 488 U.S. 227, 232 (1988). Where the limitation is unreasonable, however, there may be a violation of the Confrontation Clause resulting from the limitation. Id. In this case the trial court found that allowing specific inquiry regarding the content of the evaluation of Dr. Pilger was barred as a specific instance of conduct or misconduct. The trial court did permit defense counsel to make general inquiry regarding the evaluation. Also during cross-examination, defense

counsel impeached Dr. Dumbauld by showing he gave petitioner a recommendation without mentioning any lack of trustworthiness. Petitioner was also given the opportunity and did present further character witnesses to rebut the prosecution's claim that he lacked trustworthiness. Upon a review of the record, the Magistrate Judge concluded that it cannot be said that the limitation on cross-examination imposed by the trial court was in any way unreasonable so as to violate petitioner's right to due process, and this court concurs.

In the Objections, petitioner argues that it was unfair of the court to allow the prosecution to present three character witnesses to rebut the "single word" testimony regarding trustworthiness offered by one of petitioner's witnesses. However, this assertion alone neither constitutes an error on the part of the trial court nor establishes a violation of petitioner's due process rights. This court, therefore,. agrees with the conclusions and reasoning in the R&R; petitioner's claim that he was denied due process as a result of the admission of evidence by the prosecution of petitioner's lack of trustworthiness, and also as a result of the limitation of cross-examination of Dr. Dumbauld, are not bases for habeas relief.

2. Evidence of Birth Control

Petitioner sought to elicit testimony from Ms. Klapper's gynecologist that in December of 1989, she told him she was sexually active and using "rubber and rhythm methods" of birth control. Defense counsel argued that Ms. Klapper's knowledge about birth control methods was relevant to her willingness to consent to sexual intercourse with petitioner. The trial court found the testimony inadmissible pursuant to Section 1103 of the California Evidence Code as evidence of prior sexual conduct. The state court noted it was petitioner's testimony that raised the

issue of Ms. Klapper's use of birth control pills that the prosecution had narrowly responded to the petitioner's testimony in this regard by introducing evidence by Ms. Klapper's gynecologist that he had prescribed the pills for a medical problem and that she had not started taking the pills. The Court also found the inquiry inappropriate under Section 352 of the Evidence Code since it would be time consuming and there would be a danger of confusion and potential prejudice.[2]

The right to confront witnesses under the Sixth Amendment includes the right to cross-examination. Davis v. Alaska, 415 U.S. 308, 315-16 (1974). It also includes the right to present relevant evidence. Michigan v. Lucas, 111 S. Ct. 1743, 1746-47 (1991). It is within the discretion of the trial court, however, to exclude irrelevant evidence, and to determine which are relevant. United States v. Torres, 937 F.2d 1469, 1473 (9th Cir. 1991).

"Even relevant evidence may be excluded in certain circumstances. The right to present relevant testimony 'may in appropriate cases bow to accommodate other legitimate interests in the criminal trial process.'" Wood v. Alaska, 957 F.2d 1544, 1549 (9th Cir. 1992)(quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973). For example, the Supreme Court has recognized that a state has a legitimate interest in protecting rape victims against unwarranted invasions of privacy and harassment regarding their sexual conduct. Wood, 957 F.2d at 1549.

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[2] The trial court noted, from prior discussion between the parties and the court, that it was aware the prosecution had evidence that Ms. Klapper had engaged in sexual intercourse with aprevious boyfriend, had been traumatized by the experience, and had indicated she would have no further encounters. The court decided it was best to confine the evidence regarding Ms. Klapper's sexual history to that already presented.

In the R&R, the Magistrate Judge ruled that even if the evidence were of some marginal relevance, it cannot be said the trial court abused its discretion in excluding the evidence given the potential for confusion of the issues and prejudice. The magistrate court held that the exclusion of evidence regarding Ms. Klapper's prior sexual history or knowledge and use of birth control did not violate petitioner's rights under the Sixth Amendment.

In his Objections, petitioner argues that he should have been allowed to introduce the testimony regarding Ms. Klapper's knowledge about birth control contained in the physician's notes. He claims the testimony was relevant to rebut the physician's direct testimony about the purposes of the birth control prescription. According to petitioner, the notes contradict the physician's assertion that he prescribed the birth control pills for Ms. Klapper's menstrual spotting and demonstrate that he and Ms. Klapper discussed her sexual activity. Though there is evidence that Ms. Klapper and her physician discussed her sexual activity, the notes do not contradict the physician's testimony as to why he prescribed the pills. More importantly, petitioner provides no basis for this court to conclude that the state court abused its discretion when it excluded evidence of the victim's prior sexual history. Moreover. to admit the discussion about birth control would necessitate evidence of the trauma she experienced by her prior sexual encounter and her resulting desire to abstain. There was a danger of an undo consumption of time when the only relevance of the birth control issue was to reiterate petitioner's statement that petitioner said she was on the pills. The court, therefore, agrees with the R&R which ruled that petitioner's claim in this regard is not a basis for habeas relief.

E. <u>Ineffective Assistance of Counsel</u>

Petitioner claims he was denied effective assistance of trial counsel in four instances (1) counsel failed to appropriately object to the playing of the tape of the October 23, 1991 interrogation; (2) counsel. failed to object to certain statements made by the prosecution in closing argument; (3) counsel failed to object to the asking of guilt-assuming hypotheticals by the prosecution; and (4) counsel failed to object to the officer's testimony that on hearing of Ms. Klapper's death, petitioner appeared to be trying to make himself cry.

As stated in the R&R, in order to prevail on his claim of ineffective assistance of trial counsel, petitioner must "overcome a strong presumption that counsel 'rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment' and established that [counsel's] performance was 'outside the wide range of professionally competent assistance.'" Clabourne v. Lewis, 64 F.3d 1373, 1377 (9th Cir. 1995)(quoting Strickland v. Washington, 466 U.S. 668, 690 (1984). Even if petitioner establishes that the legal assistance he received at trial was inadequate, petitioner must go further and demonstrate prejudice as a result of the actions of counsel. In this context, prejudice means that petitioner must demonstrate a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. at 694.

The R&R addressed each of petitioner's grounds for claiming ineffective assistance of trial counsel. The Magistrate Judge found that petitioner could not meet the two-prong Strickland test and that he could not establish that his counsel was ineffective in any respect.

1. Playing of the Interrogation Tape

Petitioner objects generally to the R&R's conclusion that there could be no ineffective assistance claim on this issue given the determination that there was no error in playing the tape. In this instance, the court concurs with the R&R and also concludes that the playing of the interrogation tape was not in error; therefore, it cannot be shown that there was any prejudice resulting from counsel's failure to object adequately. Thus, the court may not grant habeas relief on this issue.

2. Final Argument by Prosecutor

Petitioner argues that several statements made by the prosecution in its final argument were unduly prejudicial and should have been objected to by his trial counsel. However, the R&R states that petitioner has failed to show that any of the prosecutor's comments were so egregious as to rise to the level of prosecutorial misconduct. In his Objections, petitioner claims that the prosecutor's inflammatory comments referring to personal knowledge of worse "things" about the petitioner constitute highly prejudicial and egregious behavior. Petitioner argues that his counsel's failure to object to this comment represent ineffective assistance of counsel since the comment itself was grossly prejudicial.

This court agrees with the R&R's conclusion that the statements that petitioner was a liar, that he had made up a story, and that the story was "garbage" were all reasonable arguments based upon the evidence presented at trial. Therefore, trial counsel's failure to object to these statements cannot be said to have been erroneous.

The implication by the prosecutor that he knew of other

evidence of bad acts by petitioner is a more troublesome statement. The prosecutor stated the following: "[petitioner is] the biggest liar you've encountered. He is a lot worse than that. I'm not going to tell you.. You can imagine some of the things I would tell you what he really is. I'm not going to tell, because you know. You know in your hearts what else." In addition, the prosecutor argued that "the reason [defense counsel] talked about involuntary manslaughter is because he knows that you know that the defendant is guilty." However, as the R&R stated, it cannot be said that these statements were so egregious as to infect the trial with unfairness. Donnelly v. DeChristoforo, 416 U.S. 637, 643 (1974). Therefore, trial counsel's representation on this issue cannot be considered ineffective.

3. Guilt-Assuming Hypotheticals

Petitioner claims his counsel was ineffective for failing to object to several "guilt-assuming" hypotheticals asked by the prosecution. The prosecution asked several of the defense witnesses if their opinion of petitioner's character would change if they reviewed all the evidence in the case, if the evidence showed beyond a reasonable doubt that petitioner was guilty, or if they had an opportunity to investigate the truth of all the petitioner's statements. The R&R stated that upon review of these statements, "it is clear that these are not improper guilt-assuming hypotheticals such that they would have been inadmissible at trial. Therefore, trial counsel was not ineffective for failing to object to the questions." R&R at 26.

Relying on U.S. v. Siers, 873 F.2d 747 (4th Cir. 1989), petitioner claims that these types of hypotheticals are improper in a criminal trial. 873 F.2d at 749 (condemning the use of hypothetical questions in the cross-examination of character witnesses). In that case, however, the court upheld the

conviction by concluding that the hypotheticals put to the defendant's witnesses constituted harmless error. Id. at 750. In the case at bar, based on the law cited, it is unclear whether the hypotheticals actually put to the defendant's character witnesses may be considered improper under California law. Even if they were improper, their presentation did not constitute reversible error; instead, in light of the prosecution's case against defendant the introduction of these hypotheticals was harmless error. Since the hypotheticals do not jeopardize the validity of the jury's verdict, petitioner cannot claim that his counsel provided ineffective assistance by not objecting to their presentation.

4. Officer's Testimony that Petitioner Was Trying to Make Himself Cry

Petitioner claims his counsel was ineffective for failing to object to testimony by one police officer that on the morning of Ms. Klapper's death, petitioner was acting like he was trying to cry. The California Court of Appeal found this was, in fact, improper lay opinion and should not have been permitted. However, The Court of Appeal found the admission of the evidence was harmless.

This court agrees with the R&R and the California Court of Appeals. Though the lay opinion was improper, it cannot be said that the admission of this by the one police officer was prejudicial. The evidence presented in this case was ample to justify petitioner's conviction. It appear that a statement by a police officer regarding his perception of petitioner's state of mind would have had little if any effect upon the jury. Therefore, it cannot be said that trial counsel was ineffective.

F. Constitutionality of California Felony Murder

In his Petition, petitioner argues the California scheme allowing petitioner to be found guilty of first degree murder based upon an unintentional homicide and allowing a sentence in excess of what intentional murderers receive is unconstitutional. In his Objections, petitioner further avers that such a scheme violates his rights to equal protection and due process. He claims that there is no rational basis for punishing felony-murderers more severely than premeditated murderers. Petitioner cites a California court's dissent to buttress this contention. See People v. Anderson, 43 Cal.3d 1104, 1147 (1987) (Broussard, J. dissenting) Beyond this case, petitioner cites no authority to support his argument.

The R&R discussed the Supreme Court's ruling in Tison v. Arizona ,481 U.S. 167 (1987). The Court held that the Eighth Amendment does not prohibit the death penalty as being unconstitutionally disproportionate in the case of a defendant whose participate in a felony resulting in murder, even where the defendant's mental state is only one of reckless indifference. Petitioner cites no authority to the contrary. Therefore, petitioner has not stated any basis for relief with regard to the constitutionality of his conviction for first degree murder or his sentence for life without possibility of parole.

V. CONCLUSION

After reviewing the record of the case de novo and taking into consideration the Magistrate Judge's R&R and petitioner's Objections, the court adopts the R&R en toto and DENIES petitioner's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

IT IS SO ORDERED.

DATED: 2/28/98

JUDGE JUDITH N. KEEP
United States District Court
Southern District of California

CC: ALL PARTIES
MAGISTRATE JUDGE